Supreme Court, U.S.
FILED

(1)

No. 04-1174 FEB 28 2005

OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term, 2004

In the Matter of property located at 14255 53rd Ave. S.,
Tukwila, King County, Washington;
Sheila Jeanne Malbrain and Lee Terrell,

In the Matter of property located at 14247 53rd Ave. S.,
Tukwila, King County, Washington;
Carl and Patrice Gorgey, husband and wife,

In the Matter of property located at 14215 53rd Ave. S.,
Tukwila, King County, Washington;
Ralph and Thelma Kissinger as Trustees of
the R&T Kissinger Living Trust,

Petitioners,

v.

Washington State Department of Agriculture,

Respondent.

On Petition for Writ of Certiorari
to the Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

*John M. Groen **Counsel of Record*
GROEN STEPHENS & KLINGE LLP
2101 112th Avenue, NE, Suite 110
Bellevue, Washington 98004-2944
Telephone: (425) 453-6206
Attorneys for Petitioners

QUESTION PRESENTED FOR REVIEW

As a result of nursery importation of bonsai plants from Korea, five citrus long horned beetles may have exited the plants and escaped into the adjacent residential neighborhood. The beetles are considered a severe pest that if introduced would cause significant ecological and economic damage. To avoid infestation, the Washington Department of Agriculture destroyed all potential host trees within a one-eighth mile radius of the nursery. When government enters a private residential yard and destroys and hauls away healthy trees that are part of the owner's landscaping, is there a taking of private property requiring payment of just compensation under the Fifth Amendment of the federal Constitution?

PARTIES TO THE PROCEEDINGS

The Petitioners are the owners of three separate residential properties. They are Sheila Malbrain and Lee Terrell, Carl and Patrice Gorgey, and Ralph and Thelma Kissinger as Trustees of the R&T Kissinger Living Trust.

The Respondent is Washington State Department of Agriculture.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners have parent corporations and no publicly held company owns 10% or more of any of the Petitioners' stock.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AT ISSUE 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 4

ARGUMENT 5

I. REVIEW SHOULD BE GRANTED TO RESOLVE AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 5

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Armstrong v. United States,
364 U.S. 40, 49 (1960) 4, 6

Dolan v. City of Tigard,
512 U.S. 374, 396 (1994) 5

House v. Superior Court,
3 Cal.3d 296, 304-05 n.10 (1970) 5

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419, 427 (1982) 5, 6, 14

Palazzolo v. Rhode Island,
533 U.S. 606, 617-18 (2001) 6

Penn Central Transportation Company v. City of New York,
438 U.S. 104, 123 (1978) 6, 5, 14

Pennsylvania Coal Company v. Mahon,
260 U.S. 393 (1922) 5, 8, 2

Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency,
535 U.S. 302, 336 (2002) 6

STATUTES

28 U.S.C. § 1257 1

CONSTITUTIONAL PROVISIONS

120 Wn. App. 737, 86 P.3d 222 (2004) 1

OPINION BELOW

The opinion below by Division I of the Court of Appeals of Washington is reported at 120 Wn. App. 737, 86 P.3d 222 (2004). Appendix A.

JURISDICTION

The decision below was entered on March 22, 2004. Petitioners filed a Petition for Review with the Washington Supreme Court which was denied November 30, 2004 as reported at 152 Wn.2d 1032, 103 P.3d 201. The order denying review is reproduced at App. B.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment to the United states Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

In August 2001, the Washington State Department of Agriculture ("Department") discovered eight Citrus Longhorned Beetle exit holes in maple bonsai stock that had been imported from Korea to a commercial nursery in Tukwila, Washington. Three beetles were captured. Accordingly, it was possible that five beetles had exited from the bonsai stock after it arrived in Tukwila.

Of those five potential beetles, some may have been female, may have mated, may have exited the bonsai stock after arriving in Tukwila, and may have flown off the nursery grounds to parts unknown in the nearby vicinity. It is also possible that such a beetle may have been smashed on a windshield, or otherwise met its demise, due to heavy traffic on Interstate 5, which is immediately adjacent to the nursery.

Nobody knows **when** the beetles exited the bonsai stock, **where** they went, or what might have happened to them. The Department did not contend that there was any evidence of a beetle on any of the Petitioners' properties.

Nevertheless, **if** female beetles had mated and successfully flown across Interstate 5, or elsewhere in the vicinity, the risk was present that the beetle could become established in Washington.

According to the Department, the potential damage could be in the hundreds of millions of dollars. The court below described the long horn beetle as a "dangerous pest." App. A-1.

> An established beetle population could become a severe pest of forest ecosystems, urban and suburban shade trees, and agriculture.

App. A-2.

The Department explained that if the beetle became established in Washington, significant harm could come to the forestry, horticultural and agricultural industries, including embargoes against some Washington products, loss of ornamental trees in cities and towns, damage to natural ecosystems, likely devastation of riparian forests important

for salmon survival, and significant future economic costs to control and eradicate the beetle.

Because of that potential public impact, Governor Gary Locke proclaimed an emergency and authorized the Department to implement an eradication plan. App. A-2. The plan called for complete destruction and hauling away of all potential host trees within one-eighth mile of the nursery. App. A-3.

Petitioners do not challenge that establishment of the Citrus Longhorned Beetle in Washington would have devastating impacts on the economy and many industries. Petitioners merely seek just compensation for the destruction of the trees in their backyards. All three Petitioners live across the I-5 freeway from the nursery and had their ornamental landscape trees destroyed by the Department.

The Department and the Petitioners have stipulated to the amount of just compensation that would be required if compensation is constitutionally mandated. Petitioners, Ralph and Thelma Kissinger, had trees valued by an arborist at $17,215. The trees destroyed from Carl and Patrice Gorgey's home were valued $4,430. Finally, Sheila Malbrain and Lee Terrell had numerous ornamental trees in their yard that were destroyed by the Department and valued at $116,262. App. A-3.

The trial court determined that the cutting and removal of healthy trees required payment of just compensation under the federal constitution. App. C.

The Court of Appeals reversed. The Court of Appeals determined that because the destruction of the trees was "to avert a public calamity, the Takings Clause did not require compensation to the owners of the trees." App. A-1.

Petitioners argue that this same significant public purpose—avoiding a public calamity—is the reason why compensation should be paid. Petitioners rely on the principle in *Armstrong v. United States*, 364 U.S. 40, 49 (1960), which holds that the Takings Clause "was designed to bar Government from **forcing some people alone to bear public burdens** which, in all **fairness and justice**, should be borne by the public as a whole." Emphasis added.[1] The court below dismissed application of this principle in one sentence. Rather than analyzing the fairness of shifting public burdens to select individuals, the court below characterized the total destruction and hauling away of the trees a "merely a consequence incidental to a valid regulatory measure." App. A-

Petitioners now seek review in this Court.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10 (c) lists among the considerations governing review on certiorari the circumstance when a state court has decided an important question of federal law which has not been, but should be, settled by this Court. This basis for granting review is present in this case.

[1] Petitioners also rely on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) wherein this Court held that a physical invasion of private property is invariably found to be a taking.

ARGUMENT

I

REVIEW SHOULD BE GRANTED TO RESOLVE AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The question presented in this case goes to the heart of Takings Clause principles. **On one hand**, this Court recognizes that a strong public purpose cannot insulate government from paying compensation. As stated long ago by Justice Holmes,

> A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922). *See also Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (quoting *Pennsylvania Coal*).

On the other hand, a branch of case law has developed in the lower courts holding that when the public purpose is *really significant*—to avert a public calamity—the constitutional command of just compensation can be excused. These cases refer to the "public necessity" or "emergency" exception to the Takings Clause. *See House v. Superior Court,* 3 Cal.3d 296, 304-05 n.10 (1970) and cites therein.

In the present case, the Petitioners are innocent bystanders of the events. They did not import the bonsai

plants. They were not responsible for border inspections. They did not invite the beetles to their property. Nevertheless, they have been singled out to bear the burden of averting a public calamity by having their beautiful trees destroyed and hauled away. It is one thing to have your trees sacrificed. It is quite another thing to also be denied just compensation for this forced contribution to the public good.

This Court has repeatedly stated that the guiding principle of the Taking Clause is to

> bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong, 364 U.S. at 49; *see also Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 123 (1978); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001); *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332, 336 (2002).

There are numerous cases holding that destruction by government of rotten fruit, diseased animals, and infected trees and plants, can be accomplished without payment of compensation. Such holdings are typically consistent with the guiding principle cited above. For example, in most instances the rotten fruit, or diseased animal, no longer has any value because of its deteriorated condition. Likewise, the item is itself a health hazard and nuisance to other fruit or animals that are not yet diseased or infected. Under these circumstances, the owner has not been singled out to bear a public burden. Rather, the value in the owner's property has already been destroyed by its condition, and the property is a source of harm to other properties. Principles of fairness and justice do not require compensation because hastening the

complete destruction of the property does not actually cause further damage than the owner otherwise would incur. Moreover, the owner is typically responsible for causing or allowing the problem to occur in the first place.

In sharp contrast, the Petitioners here have **healthy trees**. The Petitioners and their trees are not a nuisance and are **not the source or cause of the problem**. The court below characterizes the trees as "noxious" or a "nuisance" because of their potential to host the beetle. As stated by the court below:

> However beautiful to look at, the trees become a noxious use when they are in a position to spread a pestilence.

App. A-10. Such semantical gamesmanship ignores reality. The **beetle** is the cause of the problem. The **beetle** is the dangerous pest. The **beetle** is the nuisance. The **beetle** is the thing that needs to be eradicated. Indeed, if the Department could find the five beetles that may have exited from the bonsai plants, there would be no reason to destroy Petitioners' trees. Under these circumstances, it is not fair or just to place the burden of eradicating the beetle on this select group of people who happen to reside in the vicinity of the nursery.

Nevertheless, the court below follows a view that whenever a "public necessity" or "emergency" requires action, compensation is not constitutionally mandated. Whether such an exception to the Takings Clause exists, and if so what are its boundaries, has never been addressed by this Court.

In 1879, this Court rendered a decision in *Bowditch v. Boston*, 101 U.S. 16 (1979). That case involved a

conflagration in Boston where a property owner's building was destroyed by public officials in the course of fighting the fire. The property owner sought compensation **only** under a state statute and city ordinance. 101 U.S. at 17 ("The claim is founded upon certain statutes of the State of Massachusetts, and an ordinance"). The case only involved "questions of local law" and this Court explained that it sat "as if we were a court of the State." *Id.* at 19.

Accordingly, *Bowditch* did **not** involve the federal constitutional command of just compensation. This Court made no ruling regarding the existence or scope of a public necessity or emergency exception to the Takings Clause of the Fifth Amendment. The only relevant discussion is a mention in dicta that at common law, private property could be destroyed without compensation to prevent the spreading of a fire. *Id.* at 18. Indeed, such was the king's prerogative, as explained by Professor Stoebuck:

> The power to raze houses in a conflagration was historically one of a long list of ancient prerogative powers of the English Crown which, like most of the prerogatives, the crown could exercise without compensation.

William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 Wash. & Lee L.R. 1057, 1067 (1980).

That *Bowditch* did not address questions of fairness under the Takings Clause was subsequently observed by Justice Holmes in *Pennsylvania Coal Company v. Mahon.*

> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be

> recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon **tradition** as upon **principle**. *Bowditch v. Boston*, 101 U.S. 16, 25 L. ed. 980. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders.

Pennsylvania Coal, 260 U.S. at 415-16 (emphasis added).

Accordingly, even at the inception of the regulatory takings doctrine, Justice Holmes recognized that destroying private property to fight a fire may be "too far" and require compensation. If compensation is not required, such a result rests upon tradition, not principle.[2]

Likewise, *Miller v. Schoene*, 276 U.S. 272 (1927) does not meet the circumstances of the present case. At issue in *Miller* was a state law authorizing destruction of red cedar trees that were infected with cedar rust disease and located within 2 miles of an apple orchard. This Court's decision analyzed whether it was within the proper exercise of the police power for the state to make a choice between two classes of property.

---

[2] There may be a more principled basis for denying compensation in the context of a conflagration. In such circumstances, the line of houses are destroyed to create a fire break. Without the firebreak, such houses were doomed to destruction anyway. The government merely hastened their demise by a short time. Nevertheless, in *Bowditch v. Boston*, the state statutes and local ordinance provided a right of compensation implicitly because it was only fair and just to compensate the owner whose property was sacrificed for the general public good.

> [T]he state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity.

Id. at 279. This Court concluded:

> And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one the distinguishing characteristics of every exercise of the police power which affects property.

Id. at 279-80.

While this Court upheld the destruction of cedar trees as valid exercise of the police power, there is no discussion of the Takings Clause or whether such exercise of the police power goes "too far" so that compensation should be required to sustain the act. *Pennsylvania Coal* and considerations of fairness under the facts of that case are not discussed at all. Nor is *Bowditch* cited.

Most significantly, the trees in *Miller* **were infected** with the disease. *Miller*, 276 U.S. at 277 ("with which they were infected"). In contrast, the Petitioners' trees in the present case are healthy trees. This significant distinction was pointed out to the court below. Nevertheless, the court below construed *Miller* as authorizing, without compensation, the destruction of healthy trees.

> The respondents focus on the first sentence of the *Miller* opinion, where the Court

> refers to the destruction of cedar trees as a means of preventing the communication of a disease 'with which they *were infected'*. (citation omitted). They fail to recognize that the statute upheld by the court permitted destruction of healthy trees (any red cedar tree 'which is or *may be*' the host plant).

App. A-11-12.

In other words, the court below construes this Court as holding that healthy trees can be destroyed without compensation. This is a significant extension of principle, as well as an extension beyond the actual facts of the *Miller* case. Moreover, a closer review of the statute in *Miller* shows that before a tree could be destroyed a state entomologist was required to investigate and "ascertain if any cedar tree or trees are the source of, harbor or constitute the host plant for the said disease." *Miller*, 276 U.S. at 278. To conclude, as does the Court of Appeals, that such a case authorizes uncompensated destruction of healthy, free of disease trees is not warranted. If the law is to have such a broad exception to the Takings Clause, such a ruling must come from this Court.

Here, there was an outright appropriation of Petitioners' property. The Department entered their yards, cut down their trees, and hauled them away. Such confiscation is a taking in the most fundamental sense. Nevertheless, the court below extends the reach of uncompensated exercise of the police power yet another step. Justice Holmes warned of this tendency when he stated:

> The protection of private property in the 5th Amendment presupposes that it is wanted

> for public use, but provides that it shall not be taken for such use without compensation. ... When this seemingly absolute protection is found to be qualified by the police power, the natural **tendency** of human nature is to **extend the qualification more and more until at last private property disappears.** But that cannot be accomplished in this way under the Constitution of the United States.

Pennsylvania Coal, 260 U.S. at 415 (emphasis added).

The issue presented here goes to the heart of the relationship between the individual and the State. If the Constitutional protection to protect private property is to mean anything, it should protect the right of compensation for those who are forced to bear the burden of sacrificing their private property for the overall public good. Fairness and justice require no less.

> [W]e assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is **upon whom the loss** of the changes desired **should** fall.

Id. at 416 (emphasis added).

This Court should decide whether innocent homeowners should bear the uncompensated destruction of their landscape trees in order to avert a potential public calamity. Under these circumstances, the burden should be borne by the public, not the individual. The constitutional command of just compensation should be enforced.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the writ of certiorari be granted.

DATED: February 28, 2005.

Respectfully submitted,

*John M. Groen,
**Counsel of Record*
Diana M. Kirchheim
GROEN STEPHENS & KLINGE LLP
2101 112th Avenue, N.E., Suite 110
Bellevue, Washington 98004-2944
Telephone: (425) 453-6206
Attorneys for Petitioners

APPENDIX A

Court of Appeals of Washington,
Division 1.

In the Matter of Property Located At 14255 53rd Ave., S.,
Tukwila, King County, Washington;
Sheila Jeanne Malbrain and Lee Terrell,
Respondents,
In the Matter of property located at 14247 53rd Ave. S.,
Tukwila, King County, Washington;
Carl Gorgey and "Jane Doe" Gorgey, husband and wife,
Respondents,
In the Matter of property located at 14415 53rd Ave. S.,
Tukwila, King County, Washington;
Ralph and Thelma Kissinger as Trustees of the
R & T Kissinger Living Trust,
Respondents,

v.

Washington State Department of Agriculture,
Appellant.

Nos. 51042-8-I, 51142-4-I, 51141-6-I.

March 22, 2004.

BECKER, C.J.

To prevent a widespread infestation by the citrus longhorned beetle, a dangerous pest, the State Department of Agriculture undertook to destroy all potential host trees near a location in Tukwila where five beetles accidentally escaped from quarantine. Litigation arose when several landowners refused to allow their trees to be destroyed unless they first received compensation. Because the Department justifiably took action necessary to avert a public calamity, the Takings Clause [FN1] did not require compensation to the owners of the trees. The order requiring the Department to pay compensation is reversed.

FN1. Washington Const. Art. I, § 16; U.S. Const. Amend. V.

Three citrus longhorned beetles were found in a Tukwila nursery in August 2001, in maple tree bonsai stock imported from Korea. One beetle was a pregnant female. Because there were eight beetle exit holes on the stock, five beetles had presumably escaped from the quarantine area; in fact, one was seen flying away from the nursery. The discovery of the accidental escape was alarming because the beetle, a major pest of citrus, also feeds on many other species of trees, including apple and other fruit trees as well as alder, willow, oak and some conifers. Eventually the beetle kills all host trees.

Washington's Department of Agriculture, assisted by its federal counterpart, assembled a panel of experts, the "Science Advisory Panel", and posed a series of questions on how best to respond to the exposure. The panel answered that the discovery of the beetles in Tukwila should be viewed as an introduction of the beetle into the area, not just a regulatory incident, and that if effective action was not taken soon, there was a "strong likelihood" that the beetle would become permanently established. An established beetle population could become a severe pest of forest ecosystems, urban and suburban shade trees, and agriculture. Should infestation occur, the threat was not only to Washington, but to the Northwest in general, to California, and to much of the rest of North America. To wait for definite evidence of a reproducing population before initiating control measures would not be prudent because if the beetles were reproducing, after a year they would be virtually uncontainable.

Because of the way in which the beetle burrows into a host tree, its presence is very difficult to detect. The beetle emerges from the tree only upon reaching adulthood. The only truly effective method of eradicating the beetle is by completely destroying the potential host trees. Injecting insecticides into the trees can be a supplemental method of eradication, but it does not achieve high mortality and its effectiveness varies with the species of tree. [FN2]

FN2. Clerk's Papers, 43-51: The Science Advisory Panel's answers to questions from the Washington State Department of Agriculture, October 26, 2001.

Based on the panel's report, the Department began to survey all properties within half a mile of the escape site to look for evidence of the beetle and to identify potential host trees. The Department's final eradication plan, the development of which included review under the State Environmental Policy Act, called for removal of all host species trees within a one-eighth mile radius from the escape site, injection of insecticide into suspected host trees out to one-quarter of a mile, and surveillance out to half a mile. The plan to remove trees within a one-eighth mile radius--a distance chosen based on how far the beetle is known to fly upon emerging--affected approximately 32 acres of land and 51 landowners.

Governor Gary Locke proclaimed an emergency in June 2002 and authorized the Department to implement the eradication plan. The Department immediately began to remove trees. The landowners within the one-eighth mile radius found themselves in the predicament that through no fault of their own, their lovely trees had become a threat to the community because of their susceptibility to being commandeered by a noxious pest. The Department established a $100,000 fund for the purchase of replacement trees and other vegetation for yards and gardens, and arranged to supply landowners with vouchers that could be used to obtain various non-host species of vegetation from participating nurseries. [FN3] But these efforts to mitigate the effect of the eradication plan fell short of what several landowners regarded as fair. The landowners who are the respondents in the present case took the position that they were constitutionally entitled to just compensation before their trees could be destroyed. Targeted for destruction on land belonging to Sheila Malbrain and Lee Terrell were fruit trees, flowering plums, poplar trees, rose and lilac bushes, azaleas, and fir trees their arborist valued at a total of $116,262. Seven fruit trees on Carl Gorgey's land were valued at $4,430. Six broadleaf trees on land belonging to Ralph and Thelma Kissinger were valued at $17,215.

FN3. Clerk's Papers at 83.

The Department sought administrative warrants to gain entry to the respondents' properties. The superior court found that the warrants were supported by probable cause. The court made an unchallenged finding that the beetle constituted an "extreme threat to the interests of the state" and that the Department acted reasonably in its response to this threat. [FN4] The court nevertheless ruled that destruction of the trees was a compensable taking, and conditioned the issuance of the warrants upon the landowners first being compensated.

FN4. Clerk's Papers at 227.

So that the warrants would issue immediately, the Department negotiated a stipulation with the respondents whereby the Department would be able to appeal "the substantive issues regarding takings and the timing of compensation", but it would not be able to challenge on appeal the amount of compensation as determined by the landowners' arborists. [FN5] Upon the stipulation being read into the court record, the court issued the warrants, and the Department destroyed the trees.

> FN5. Report of Proceedings (July 30, 2002) 143-44; *see also* Final Judgment, Clerk's Papers at 524 ("The parties' stipulation as to the amounts owed is without prejudice to the right of the Department to contend on appeal that no compensation is owed because no compensable taking has occurred, and enforcement on this judgment is stayed pending the resolution of any appeal.").

These facts are undisputed. The Department appeals from conclusions of law supporting the final Judgment and Order. The essential issue is whether the destruction of the trees to combat the threat of a beetle infestation was a compensable taking.

The United States Constitution guarantees that private property shall not be taken for public use, without just compensation. U.S. Const. Amend. V. The Washington Constitution has a similar guarantee, and states that compensation is to be paid before the

taking: "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner". Const. Art. I, § 16.

[1] Not every government action that takes, damages, or destroys property is a taking subject to the constitutional compensation requirement. *Eggleston v. Pierce County*, 148 Wash.2d 760, 768, 64 P.3d 618 (2003) (police, in seizing evidence of a crime, removed load bearing walls, thus rendering a home uninhabitable; held, the damage claim was not cognizable under state and federal Takings Clauses). The United States Supreme Court has stated that no set formula exists to determine whether compensation is constitutionally due for a government restriction of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). The inquiry is essentially ad hoc and factual, though not standardless. Even a substantial regulation of the use of property may be upheld without making it subject to the compensation requirement of the Takings Clause upon consideration of various factors set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). *Loretto*, 458 U.S. at 426, 102 S.Ct. 3164. But when a physical intrusion by government "reaches the extreme form of a permanent physical occupation", that factor alone is determinative of a taking. *Loretto*, 458 U.S. at 426, 102 S.Ct. 3164. A permanent physical occupation "is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine", and as a per se taking will categorically require the payment of compensation. *Loretto*, 458 U.S. at 432, 102 S.Ct. 3164. The landowners here contend that the confiscation of their trees was a per se categorical taking under *Loretto*.

The New York statute at issue in *Loretto* required landlords to permit installation of cable wire and boxes on their property to facilitate cable television transmission. *Loretto*, 458 U.S. at 423, 102 S.Ct. 3164. In a takings claim by a landlord whose building had been wired by Teleprompter, defendants argued that the statute did not require compensation because it was simply a permissible exercise of the state's police power to regulate the use of real property and the landlord-tenant relationship. The Supreme Court

concluded that the installation of cable in reliance on the statute was a permanent physical occupation of real property, and therefore a compensable taking. The Court did not question a lower court's conclusion that the statute served a legitimate public purpose and was within the state's police power. "It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 425-26, 102 S.Ct. 3164 (citations omitted).

[2] Central to the Court's decision in *Loretto* was the permanently invasive nature of the cable installations. *Loretto*, 458 U.S. at 430, 102 S.Ct. 3164. A per se taking occurs only where there is a permanent physical occupation, not where the invasion is temporary or where government action outside the property causes some consequential damage within it. *Loretto*, 458 U.S. at 428, 102 S.Ct. 3164. "The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking." *Loretto*, 458 U.S. at 435 n. 12, 102 S.Ct. 3164. Flooding caused by government construction, for example, will not amount to a taking unless it constitutes an actual, permanent invasion of land, amounting to an appropriation of, and not merely injury to, the property. *Loretto*, 458 U.S. at 428, 102 S.Ct. 3164, citing *Sanguinetti v. United States*, 264 U.S. 146, 149, 44 S.Ct. 264, 68 L.Ed. 608 (1924). Under *Sanguinetti*, flooding that reduces property to "an irreclaimable bog" is a compensable taking, but compensation need not be paid in a case of intermittent flooding that does not destroy the usefulness of the flooded property. *Sanguinetti*, 264 U.S. at 149, 44 S.Ct. 264.

The respondents contend that if the permanent physical occupation of such a small amount of space as was needed for the cable boxes and wires in *Loretto* is unquestionably a taking, the permanent and complete confiscation of their trees must *a fortiori* have been a taking also. But ownership of growing trees is a real property interest, a part of an estate in land. *Layman v. Ledgett*, 89 Wash.2d 906, 911, 577 P.2d 970 (1978). The trees destroyed

by the Department were part of the realty belonging to the respondents. The Department entered upon the respondents' real property in response to an emergency, destroyed the host trees, and left. This action was an injury to their property, but it did not reduce it to an irreclaimable desert. We conclude the destruction of the trees was not a government action that must, under *Loretto,* be seen as "a taking without regard to the public interests that it may serve." *Loretto,* 458 U.S. at 426, 102 S.Ct. 3164.

A better fit for these facts is the line of cases applying what is known as the law of necessity or the conflagration doctrine. "It is the law that, in meeting an emergency, such as fire, flood, or pestilence, public officials and private citizens may employ almost any available means in an endeavor to control the danger." *Short v. Pierce Co.,* 194 Wash. 421, 432, 78 P.2d 610 (1938). Our Supreme Court applied the law of necessity in *Short* to hold that berry farmers on the Puyallup River were not entitled to government compensation for topsoil that had been stripped from their property, bagged, and used in an emergency flood control operation. Only after the emergency situation had abated, and county employees continued to use the farmers' property as a base for constructing permanent flood control structures, did the government become obligated to compensate the farmers for the resulting damage. *Short,* 194 Wash. at 435-36, 78 P.2d 610.

Quoting extensively from authorities on the law of necessity, the Court in *Short* found that the emergency appropriation of farmers' topsoil was comparable to the destruction of homes to avoid a conflagration, the throwing overboard of goods in a tempest for the safety of the vessel, and the raising of bulwarks on private property as a defense against a public enemy. *Short,* 194 Wash. at 432-35, 78 P.2d 610. The Court distinguished the law of necessity, which is not dependent on the sovereign power, from the law of eminent domain, which is founded on the nature of sovereignty. *Short,* 194 Wash. at 432-33, 78 P.2d 610. The Court set forth the rule as stated in Nichols on Eminent Domain:

> When immediate action is necessary in order to avert a great public calamity, private property may be controlled, damaged or even destroyed

> without compensation. Under such conditions any individual has the right to enter another's land and destroy his property, and if he acts with reasonable judgment he is not liable to the owner. If the individual who thus enters and destroys private property happens to be a public officer whose duty it is to avert the impending calamity, the rights of the owner of the property to compensation are no greater. The most familiar example of the exercise of this right is seen in case of a fire. The neighbors and firemen freely trespass on the adjoining land, and houses are even blown up to prevent the spread of the conflagration. The danger of a flood or the existence of a pestilence may call for equally drastic action.

1 Nichols on Eminent Domain, 2d Ed. 263, Sec. 96, quoted in *Short*, 194 Wash. at 434-35, 78 P.2d 610.

The landowners attempt to confine the law of necessity to emergencies that present imminent danger to human life. But nothing in *Short* suggests that the Court there was concerned with the distinction between human life and property; indeed, the opinion describes the county as acting to "control an existing and most dangerous flood condition, which was likely to destroy not only appellants' property but much other property in the neighborhood". *Short*, 194 Wash. at 435, 78 P.2d 610. And one of the cases quoted by the Court clearly states that the principle "applies as well to personal as to real estate; to goods as to houses; to life as to property". *American Print Works v. Lawrence*, 21 N.J.L. 248 (1847), quoted in *Short*, 194 Wash. at 433, 78 P.2d 610.

[3] The destruction of ornamental trees in this case is directly analogous to the appropriation of topsoil in *Short*. In both cases there was an entry upon real property with an intent to use and destroy portions of the property to abate an emergency. The beetle emergency, proclaimed by the governor in accordance with statutory emergency powers, threatened property on a much larger scale than the flood in *Short*.

The landowners argue that there could not have been a true emergency in view of the fact that the Department did not begin cutting down the trees until almost a year after the escape of the beetles. Because it takes a year for the next generation of beetles to emerge from an infested tree, the Department had a year-long window of opportunity to plan defensive action. But this opportunity to plan did not attenuate the threat of infestation or make it speculative. Instructive on this point is *Cougar Bus. Owners Ass'n v. State*, 97 Wash.2d 466, 647 P.2d 481(1982). The governor proclaimed an emergency and issued certain executive orders in response to the threat of eruption at Mount St. Helens. A local business association challenged these orders on the theory that the governor lacked authority to use emergency powers until there was a "disaster", which they defined as "a specifically definable event causing harm or injury". *Cougar Bus. Owners Ass'n*, 97 Wash.2d at 475, 647 P.2d 481. The Court found this definition too narrow. To force the State to wait until the volcano actually erupted would limit the police power to clean-up operations, and not allow for any preventative measures. This would be contrary to the legislative intent of the statutes authorizing the governor to act in an emergency. *Cougar Bus. Owners Ass'n*, 97 Wash.2d at 475, 647 P.2d 481. Just as the emergency was created in that case by the reactivation of the dormant volcano, the emergency was created in this case by the escape of the five beetles. The Department did not have to wait for the threatened harm of infestation to occur in order to take defensive action under the law of necessity.

[4] The law of necessity has an affiliation with the law of nuisance, in that it recognizes the reciprocal obligations of property owners to each other and to the surrounding community. The power that the State has to prohibit such uses of property as may be injurious to the health, morals, or safety of the public is not, and cannot be, " 'burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.' " *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (quoting *Mugler v.*

Kansas, 123 U.S. 623, 668-9, 8 S.Ct. 273, 31 L.Ed. 205 (1887)). Property owners do not have a right to use and enjoy their property so as to create a nuisance or interfere with the general welfare of the community. *Conger v. Pierce County*, 116 Wash. 27, 36-37, 198 P. 377 (1921). For this reason, the State "has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 491 n. 20, 107 S.Ct. 1232; *see also* at 492 n. 22, 107 S.Ct. 1232.

In this case the Department did not permanently occupy the land; what it did, in effect, was to enjoin landowners from maintaining species of trees that provide a safe haven to beetles. However beautiful to look at, the trees become a noxious use when they are in a position to spread a pestilence.

The respondents argue, however, that the seizure of their trees to defeat the beetle unfairly singles them out to bear a disproportionate burden of a government program that benefits all. They quote *Armstrong v. United States:*

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)(Government could not, by enforcing a contract right, destroy the value of liens held by materialmen, without making just compensation). The argument for spreading the burden to the public as a whole is not without its appeal, as was also true in *Eggleston*, *see* 148 Wash.2d at 771, 64 P.3d 618. But even in *Armstrong*, the United States Supreme Court recognized that destruction or injury to property by the government is not always a compensable taking, and might instead be merely a consequence incidental to a valid regulatory measure. *Armstrong*, 364 U.S. at 48, 80 S.Ct. 1563.

[5] The destruction of the ornamental trees in this case is a

consequence incidental to a valid regulatory measure, one taken for the purpose of defending against an impending public peril. It is analogous to the uncompensated confiscation of cedar trees in Virginia to save the apple industry from a communicable disease, an action upheld by the United States Supreme Court in *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928). A Virginia statute made it unlawful for a person to " 'own plant or keep alive and standing' on his premises any red cedar tree which is or may be the source or 'host plant' of the communicable plant disease known as cedar rust". *Miller*, 276 U.S. at 277, 48 S.Ct. 246. Cedar rust did not affect the value of cedars in Virginia, but it was devastating to apple trees, which had greater commercial value. The only practicable method of protecting the apple trees was "the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards". *Miller*, 276 U.S. at 278-79, 48 S.Ct. 246. The Supreme Court found that such a statute was not violative of due process, although it allowed destruction of cedar trees without compensating landowners for their value, because Virginia was under the necessity of "making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity." *Miller*, 276 U.S. at 279, 48 S.Ct. 246. It would not do, the Court said, to see the statute as merely resolving a private conflict by shifting the misfortune of the apple growers to the owners of cedar trees. For "it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other." *Miller*, 276 U.S. at 279, 48 S.Ct. 246. As *Miller* demonstrates, when the private sacrifices that must be made to defeat a public enemy are not evenly distributed, the Constitution will not necessarily compel an equalizing adjustment.

The respondent landowners press the argument that under *Miller* and other infestation cases, compensation is always required when the State chooses to combat the infestation by destroying healthy trees. They inaccurately interpret *Miller* as permitting the uncompensated destruction only of those trees known to be diseased. The respondents focus on the first sentence of the *Miller* opinion, where the Court refers to the destruction of cedar trees as a means of preventing the communication of a disease "with which they *were infected* ". *Miller*, 276 U.S. at 277, 48 S.Ct. 246

(emphasis added). They fail to recognize that the statute upheld by the court permitted destruction of healthy trees (any red cedar tree "which is *or may be* " the host plant), *Miller*, 276 U.S. at 277, 48 S.Ct. 246(emphasis added); *see also Miller*, 276 U.S. at 279, 48 S.Ct. 246 (protection of apple trees required destruction of all red cedars "subject to the infection"). *Miller* does not support the respondents' attempted distinction.

The landowners ask us to follow recent Florida Supreme Court decisions, which they interpret as requiring compensation for the destruction of any tree not known to be infested by the beetle. To protect the valuable Florida citrus industry from citrus canker, a bacterial disease that spreads primarily by wind-driven rain, Florida has undertaken programs calling for the destruction of trees and stock exposed to canker but not yet diseased. While in some cases the Florida court has characterized such destruction as a compensable taking, the cases are fact-specific and often nuanced by the fact finding of trial courts on the soundness of the government's assertion that a scorched-earth approach is a practical and necessary means of containing the disease. In one case, the Florida Supreme Court ruled broadly that the State did not have constitutional authority to destroy "healthy, but suspect citrus plants" without compensation. *Department of Agric. & Consumer Services v. Mid-Florida Growers, Inc.*, 521 So.2d 101, 102 (Fla.1988). But in that case, the trial court had found insufficient evidence to establish that mere proximity to diseased plants put the apparently healthy plants at risk. *Mid-Florida Growers, Inc.*, 521 So.2d at 102, 104-105. Two years later the Florida court narrowed and clarified the holding of *Mid-Florida Growers* in another case involving state-ordered destruction of all the trees at a nursery where some trees were found to be infected. *Department of Agric. & Consumer Services v. Polk*, 568 So.2d 35, 40 (Fla.1990). The court agreed that compensation was due for the destruction of non-infected trees if they did not present a nuisance or an imminent public danger. *Polk*, 568 So.2d at 39. But the court also affirmed the trial court's order allowing even healthy trees in a zone of 125 feet from the infected trees to be destroyed without compensation. The trees within the 125-foot zone, based on evidence in the record, were held to be comparable to buildings in the path of a conflagration--a rationale akin to the law of necessity discussed by

our Supreme Court in *Short v. Pierce County, supra. Mid-Florida Growers* and *Polk,* when read together, are consistent with *Miller.* Trees as yet unaffected by disease may be destroyed without compensation, when evidence in the record shows that their proximity to a source of infestation renders them "unhealthy" as a matter of law and a source of imminent public danger.

Recently, the Florida Supreme Court decided a case involving a challenge to a 2003 Florida statute known as the Citrus Canker Law, which authorizes the destruction of apparently healthy trees within 1,900 feet of a tree infected with canker. The respondents have cited this case to support their argument that the destruction of trees always requires compensation unless the trees are actually infested or diseased. *Haire v. Florida Dept. of Agric. and Consumer Services,* No. SC03-446, SC03-552, 870 So.2d 774, 2004 WL 252015 (Fla. February 12, 2004).

We do not read *Haire* as standing for such a broad proposition. In its decision, the Court did not retract or modify its prior decision in *Polk.* The Court simply recognized that a statutory limit on compensation of $100 per tree (or less, depending on legislative appropriations) was a floor, and did not prevent courts from ordering additional compensation in an appropriate case. With that caveat, the Court upheld the statute as consistent with substantive due process, as measured by the reasonable relationship test. *Haire,* No. SC03-446, SC03-552, 870 So.2d at 780-785, 2004 WL 252015, *6-9.

[6] In summary, *Miller,* like *Short,* remains a powerful precedent establishing that the government will not have a constitutional obligation to compensate for property damage, if the damage is necessary to contain or abate a public calamity. The continuing vitality of this principle is illustrated in California's cases denying compensation for property damage caused by aerial spraying of insecticide to eradicate the Mediterranean Fruit Fly. *See Farmers Ins. Exchange v. State of California,* 175 Cal.App.3d 494, 502, 221 Cal.Rptr. 225 (1985), *review denied,* 175 Cal.App.3d 494, 221 Cal.Rptr. 225 (1986); *Teresi v. State of California,* 180 Cal.App.3d 239, 242-43, 225 Cal.Rptr. 517 (1986). As discussed above, we do not see Florida's cases as inconsistent with *Short* or

Miller. But in any event, California's decisions would be more persuasive because the takings clause in California's constitution was a model for Washington's. *Eggleston*, 148 Wash.2d at 772 n. 8, 64 P.3d 618 (citing Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 30 (2002)).

Respondents Kissinger and Gorgey request, if the trial court's order is not affirmed as a categorical taking under *Loretto,* that the case be remanded to determine whether a compensable regulatory taking occurred under the factors set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). In the hearing below, they did not argue in the alternative for a regulatory taking analysis under *Penn Central.* Indeed, their brief on appeal unequivocally states that "the case at bar is **not** a regulatory taking case." [FN6] Because the alternative *Penn Central* analysis was not presented below, is not well briefed on appeal, and does not appear to have application in any event because the destruction of the trees was necessary to meet an extremely threatening emergency, we deny the request for a remand.

FN6. Brief of respondents Kissinger and Gorgey at 7.

We conclude the Department's destruction of trees within one-eighth of a mile of the beetle escape site was not a compensable taking. The judgment for compensation is reversed.

WE CONCUR: AGID, Presiding C.J., and GROSSE, J.

120 Wash.App. 737, 86 P.3d 222

END OF DOCUMENT

APPENDIX B

The Supreme Court of Washington

No. 75426-8

In the Matter of Property Located At 14255 53rd Ave., S.,
Tukwila, King County, Washington;
Sheila Jeanne Malbrain and Lee Terrell,
Petitioners,
In the Matter of property located at 14247 53rd Ave. S.,
Tukwila, King County, Washington;
Carl Gorgey and "Jane Doe" Gorgey, husband and wife,
Petitioners,
In the Matter of property located at 14415 53rd Ave. S.,
Tukwila, King County, Washington;
Ralph and Thelma Kissinger as Trustees of
the R & T Kissinger Living Trust,
Petitioners,

v.

Washington State Department of Agriculture,
Respondent.

C/A Nos. 51042-8-I, 51142-4-I, 51141-6-I (consolidated)

ORDER

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Ireland, Chambers and Fairhurst, considered this matter at its November 30, 2004, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitions for Review are denied.

DATED at Olympia, Washington this 30th day of November, 2004.

Gerry L. Alexander
CHIEF JUSTICE

Appendix C

**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY**

In the Matter of Property Located At 14255 53rd Ave., S.,
Tukwila, King County, Washington;
Sheila Jeanne Malbrain and Lee Terrell,
Respondents,
In the Matter of property located at 14247 53rd Ave. S.,
Tukwila, King County, Washington;
Carl Gorgey and "Jane Doe" Gorgey, husband and wife,
Respondents,
In the Matter of property located at 14415 53rd Ave. S.,
Tukwila, King County, Washington;
Ralph and Thelma Kissinger as Trustees of
the R & T Kissinger Living Trust,
Respondents.

**Case Nos. 02-2-18829-0 KNT, 02-2-18830-3 KNT, and
02-2-18831-1 KNT**

MEMORANDUM DECISION

At the hearing on Friday, July 26, 2002, I indicated that I would sign the administrative warrant on Monday, having found that . . .

. . .

I also indicated on Friday that there were legal issues remaining following the close of argument that I would review over the weekend including whether these trees were "property" for purposes of the Fifth Amendment to the United States

Constitution and of Article 1, section 16 of the Washington Constitution and whether pre-taking compensation is constitutionally required. . . .

. . .

Over the decades, the jurisprudence regarding the "takings" provisions of the Fifth Amendment and of Article 1, section 16 has developed a range of nuances. Although many cases focus on real property, it is clear in Washington as well as nationally that a wide range of interests are considered property for purposes of the takings analysis.[FN 5] The jurisprudence has grown from the early case cited by the state of Mugler v. Kansas, 123 U.W. 623 (1887) in which the court held that a party was not entitled to compensation under the takings clause where the restriction on the property's use was to prevent serious public harm to its later decision in 1928 in Pennsylvania Coal Co. v. Mahon [FN 6] in which the court held that a regulation of property could constitute a taking.

. . .

No Washington authority has been cited on the precise issue presented in this case: whether the temporary trespass onto the land of private individuals to destroy the potential host trees and otherwise to regulate the use of their property in terms of future planting for five years constitutes a taking for purposes of the state or federal constitution. . . .

> [FN 5] Professor Stoebuck states: "Though this treatise concerns only property rights in land, it is clear that every species of property, in chattels and choses in action, as well as in land, is capable of being taken," citing various U.S. Supreme Court and state authorities. 17 Wash. Prac., Real Estate: Property Law, Sec. 9.8.
>
> [FN 6] 260 U.S. 393

. . . Here, the main thrust of the state's action is to destroy the trees, although there is also a use restriction limiting the types of trees that may be planted for five years. I therefore also find that the regulation here will involve a temporary physical invasion of the real property and most significantly, a total taking of the property, the trees. Under these circumstances, compensation is due.

. . .

DATED: July 29th, 2002.

JUDGE DEBORAH D. FLECK